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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JAMES MARSHALL,

Petitioner,

- vs -

STATE OF OHIO,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE EIGHTH DISTRICT COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO

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STATEMENT OF THE QUESTION PRESENTED

I

Whether the Petitioner was denied the effective assistance of counsel and due process of law when his trial lawyer failed to investigate and raise potential defenses at trial and preserve same for appellate review.

PARTIES TO THE PROCEEDING

Petitioner:

James Marshall

Respondent:

State of Ohio

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IN THE

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JAMES MARSHALL,

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- vs -

STATE OF OHIO,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE EIGHTH DISTRICT COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO

The Petitioner, James Marshall, prays that a writ of certiorari issue to review the judgment of the Ohio Court of Appeals, which judgment became final on September 15, 1982; when the Supreme Court of Ohio denied further appellate review.

OPINIONS OF THE COURTS BELOW

The judgment entries by the Supreme Court of Ohio overruling and dismissing our appeal are attached hereto as Appendices "A" and "B", infra, pp 1a - 4a in the Appendix to this Petition.

The Journal Entry and Opinion of the Eighth District Court of Appeals, the judgment to which this Petition is directed, is designated as Appendix "C" , p. 5a.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Ohio was entered on or about September 15, 1982. The jurisdiction of this Court

is invoked under Title 28 U.S.C. Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVES

The relevant constitutional and statutory provisions involved herein are set forth at Appendix "D", p. 32a.

STATEMENT OF CASE

This is an appeal from the decision of the Court of Appeals of the Eighth Judicial District affirming a denial of a Petition to Vacate Judgment, which judgment involved a sentence to a penal term for Felonious Assault.

This appeal is on a question of law. Petitioner was denied his Sixth Amendment right to the effective assistance of

counsel and thereby denied a fair trial and substantial justice.

The Petitioner James Marshall, was convicted of two counts of Felonious Assualt on July 2, 1975 and sentenced to concurrent two to fifteen year penal terms. Efforts to reverse the conviction by appeal to the Eighth Judicial District and to the Ohio Supreme Court have been exhausted. The Ohio Supreme Court denied further review on October 3, 1977.

Petitioner filed a Petition to Vacate Judgment initially on October 3, 1977, to which the State responded with a Motion to Dismiss. The trial court took no action on either Petitioner's Petition to Vacate or a Motion to Dismiss. Petitioner filed a second Petition to Vacate on November 24, 1980 when the appeal bond issued in February, 1976 was forfeited

and the Petitioner was arrested. The trial court denied Petitioner's Motion to Vacate on June 10, 1981 and the Court of Appeals subsequently affirmed on May 27, 1982. The Supreme Court of Ohio denied further appellate review.

STATEMENT OF FACTS

The essential facts relevant in this petition for writ involve the process by which the Appellant was identified by the State's witnesses as the assailant. The State's evidence consisted primarily of the testimony of Stanley Baker. Mr. Baker testified that he was driving a newly purchased 1968 Camaro on south bound Interstate 77, accompanied by his brother, Michael Baker, on February 14, 1975 at 7:30 p.m. Mr. Baker further

testified that as he was driving on the inside lane near the Clark Avenue Bridge, a dark green four door 1968 Oldsmobile pulled up along side the Stanley automobile. In the Oldsmobile were four adults and two children, according to Stanley Baker. The driver of the automobile motioned to the Bakers to roll down their window, reached into his glove compartment, and pulled out an automatic weapon and fired three shots at the Stanley car. The vehicles were traveling at a speed of approximately 40 miles an hour at this time. Baker stated that the assailant got off the interstate at Fleet Street but then he followed the Oldsmobile up the exit ramp in attempt to get the assailant's license plate and motive. Two more shots were fired at the Baker's automobile as it passed the assailant's

vehicle. Stanley Baker drove to the Newburg Heights police station to file a report on the incident. Stanley Baker identified the assailant to an on-duty officer as a "...dark skinned colored man approximately forty (40) years old, heavy-set."

Michael Baker substantially corroborated his brother's testimony. He admitted, however that he observed little concerning the second round of gunfire as he was on the floor of the automobile at the time.

On February 16, 1975, the Bakers were called down to the Cleveland Central Police Station on the pretext of viewing a possible line-up. Stanley stated that he identified the Petitioner who at the time was seated on a bench at headquarters with two other black males. One

man was fair skinned and the other was older than the Petitioner, bald and had a moustache. Stanley also admitted, after having his memory refreshed by being shown his written statement, that his brother was present when Stanley made his statement to the police and that he discussed the case with his brother.

Other testimony included that of Paul Bellito, a detective with the Cleveland Police Department. Detective Bellito testified that he and his partner verified the license check made by the patrolman upon the Baker's information, and at approximately 6:00 p.m., February 16, 1975 went to the Petitioner's home and arrested him. Petitioner was told about the accusations made against him and taken to the Central Police Station. Bellito asked the Petitioner if he would

participate in a line-up. According to Bellito and the Petitioner, although Petitioner replied "no" and requested a lawyer, Bellito told him to sit down on the bench with the two black males described above. He informed the Petitioner that he was going to request that Petitioner's accusers come down to the police station. Bellito phoned Stanley Baker and told him he had arrested a man and asked him to come down and possibly view a line-up. Both Bakers came down to the police station and walked by the bench that Petitioner shared with the two other men and went into the detective's office directly near the bench. Stanley Baker then identified the Petitioner as the Bakers' assailant and Michael subsequently concurred after Stanley made his identification.

ARGUMENT RELIED ON FOR ALLOWANCE OF WRIT OF CERTIORARI

This case presents the Court with the opportunity to further define the constitutional mandate that every criminal defendant is entitled to the effective assistance of counsel. The Court is here asked to consider whether trial counsel's failure to move to suppress an unlawful pretrial identification constitutes ineffective assistance of counsel, and thus a denial of the Petitioner's Sixth Amendment and Due Process rights. The Court has previously considered the issue of effective assistance of counsel in other areas, but is here asked to further explicate that right to mandate that the failure by trial counsel to raise a potential

objection to the introduction of tainted evidence that could convict the Petitioner, and to preserve that objection for appellate review, constitutes a denial of the Petitioner's Sixth Amendment and Due Process rights.

ARGUMENT

THE PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AND DUE PROCESS OF LAW WHEN HIS TRIAL LAWYER FAILED TO INVESTIGATE AND RAISE POTENTIAL DEFENSES AT TRIAL AND PRESERVE SAME FOR APPELLATE REVIEW.

The Sixth Amendment to the United States Constitution guarantees that a criminal defendant shall enjoy the right

"to have the assistance of counsel for his defense." This Court has consistently held that this right extends beyond the mere formal appointment of a licensed attorney-at-law to represent a defendant. This guarantee was first interpreted by the Supreme Court to mean the effective assistance of the counsel in Powell v. Alabama, 287 U.S. 45, 54 S. Ct. 55, 77 L. Ed. 158 (1932). In Powell, Justice Sutherland went beyond a formal requirement that counsel be appointed, holding that the trial judge's failure:

> "to make an effective appointment of counsel had resulted in the denial of effective and substantial aid... [D]efendants were not accorded the right of counsel in

any substanial sense." 287 U.S. at 53, 71, 53 S. Ct at 65.

The Court went on to hold in Avery v. Alabama, 308 U.S. 444, 446, 60 S. Ct. 321, 322, 84 L. Ed. 377 (1940) that:

"The constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment." 308 U.S. at 446.

The Court in Avery rested its decision on the Fourteenth Amendment, since a state defendant was involved, and held that the trial court's denial of a motion for continuance requested by appointed counsel had not deprived the defendant of the effective assistance of counsel.

Significantly, the Court reasoned on the facts of that case that:

> "His appointed counsel... have performed their 'full duty intelligently and well.'" 308 U.S. at 450.

The Court has enforced the unequivocal implication of Avery in Glasser v. United States, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942), that an inadequate performance by counsel should render a conviction void. In Glasser, the holding was based upon the Sixth Amendment and the Court overturned a conviction of the defendant whose attorney was retained by a co-defendant with a potentially inconsistent defense. There the Court held:

"Our examination of the record leads to the conclusion that representation of Glasser was not as effective as it might have been if the appointment had not been made. We hold that the Court thereby denied Glasser his right to have the effective assistance of counsel, guaranteed by the Sixth Amendment." 315 U.S. at 76, 62 S. Ct. at 468.

See also Holloway v. Arkansas, 435 U.S. 475, 98 S. Ct. 1173 (1978); compare Cuyler v. Sullivan, 446 U.S. 335, 64 L. Ed. 2d 333, 100 S. Ct. 1708 (1980). Thus, the Court has consistently recognized that trial counsel's performance, as effected by these factors, unques-

tionably impacts on the constitutionally guaranteed right to effective assistance of counsel.

In Reece v. Georgia, 350 U.S. 85, 76 S. Ct. 167, 100 L. Ed. 77 (1955), the Supreme Court essentially left no doubt that evidence of incompetence as such and basic procedural errors on the part of defense counsel, should be scrutinized in determining whether a defendant's assistance of counsel has been constitutionally adequate. In Reece, the Court held that the defendant was denied the right to effective assistance and thus to due process, where he did not have an attorney in time to object to the racial composition of the grand jury that indicted him. The Court's reasoning further establishes that this same right would be denied if an attorney had been

appointed but failed to object to the all-white grand jury composition before the grand jury returned its indictment.

The standard of effective assistance of counsel has been increasingly reinforced and further defined by the Court, as in McMann v. Richardson, 397 U.S. 759, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970). This Court held in McMann that the advice rendered by an attorney as to whether a confession would be admissible in evidence is:

> "...within the range of competence demanded of attorneys in criminal cases." 397 U.S. at 771, 90 S. Ct. at 1449.

* * *

> "...if the right to counsel is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and... judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts." 397 U.S. at 771, 90 S. Ct. at 1449.

See also, Tollett v. Henderson, 411 U.S. 258, 267, 36 L. Ed. 2d 235, 93 S. Ct. 1602 (1973).

Moreover, the Court has emphasized the inapplicability of inquiry into the question of harmless error when the fundamental nature of the constitutional

requirement of effective assistance of counsel is considered. Rather, the Court has preferred to impose an unequivocally more stringent standard and to reject the harmless error evaluation:

> "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." Glasser, 315 U.S. at 76, 62 S. Ct. at 467.

See also Holloway v. Arkansas, supra.

In the instant case, the Petitioner's trial attorney failed to investigate all apparently substantial defenses available to the defendant and to assert those defenses in a proper and

timely manner. Significantly, the record reveals that the Petitioner was not afforded the legal protection and safeguards of a line-up when he was identified as the alleged assailant by the victims of the crime. The context in which the Bakers made the identification was peculiarly suggestive and prejudicial. Stanley Baker made his identification after previously being told to come down and possibly view a line-up that included the individual the police had arrested for the assault. The Petitioner was identified by the victims as he sat in between two other men who looked nothing like the description given of the assailant.

The Petitioner's trial counsel was unquestionably aware of the circumstances surrounding the identification, yet

failed to file a Motion to Suppress the Evidence of the pretrial identification. That Motion to Suppress, had it been successful, could clearly have tainted the witnesses' subsequent in-court identification rendering it inadmissable as well. The nonaction of counsel in moving to suppress highly prejudicial evidence constitutes as egregious an infringement on the right to effective assistance of counsel as not having an attorney to object to the racial composition of a grand jury that returns an indictment against a defendant. Reece, supra. Counsel's failure to make a pivotal motion to suppress is as severe an abrogation of the right to effective assistance as being represented by an attorney who also represents a co-defendant with potentially inconsistent

defenses. Glasser, supra. Trial counsel's neglect in failing to assert a motion to suppress the tainted pretrial identification is quite possibly more prejudicial to the Petitioner than is erroneous advice rendered by an attorney on the subject of whether or not a confession would be admissible in evidence. McMann, supra.

Counsel's failure to file a motion to suppress the out-of-court identification as well as the in-court identification constitutes an ineffective assistance of counsel since such a motion would arguably have disposed of the charges against the Petitioner. There is no question that without the identification of the accused as the perpetrator of the alleged Felonious Assault, that the accused's case would have been immeasur-

ably improved. In fact, without the pretrial identification and the tainted in-trial identification, in all probability the case against the Petitioner should have been dismissed as a matter of law under Rule 29 of the Ohio Rules of Criminal Procedure. Participation by the Petitioner's counsel in a motion to suppress may very well have resulted in the exclusion of any identification testimony of the accused in the alleged Felonious Assault.

Where a suggestive identification procedure has been used, as in the present case, and it is asserted that an independent basis exists for identification, the admissibility of the evidence of the identification is determined by at least five factors. They include (1) the opportunity afforded the witness to view

the criminal at the time of the crime; (2) the degree of attentiveness shown by the witness; (3) the accuracy of the witnesses prior identification of the criminal; (4) the level of certainty evidenced by the witness at the confrontation; and (5) the amount of time elapsing between the crime and the confrontation. Neil v. Biggers, 409 U.S. 188 at 199-200 (1972). See also Manson v. Brathwaite, 432 U.S. 98 (1977).

Given the circumstances of this case, it is doubtful that the witnesses had a good opportunity to observe the Petitioner. The witnesses were traveling at night, at speeds of at least 40 mph with a weapon allegedly pointed at them. One witness, who admitted being "scared", testified to having spent a good portion of his time on the floor boards of the

car once the weapon was brandished. Similarly, the other witness, asked to describe what the other parties in the assailant's car looked like, responded that "I wasn't looking for expressions on their faces when a guy's got a gun hanging out the window shooting at me." As the parties were anywhere from 100 feet to one-half mile away from the assailant thereafter, they had virtually no opportunity to observe anything more.

Moreover, the main witness' attentiveness to the incident was quite suspect. He was, after all, driving an automobile moving at highway speed. He evidenced confusion on several occasions as to which party, his brother or he, rolled down the window in response to the assailant's request, the distance between the two cars when the shooting commenced,

and to which side of the car the assailants initially pulled up to. Moreover, a discrepancy existed between the Baker's testimony and Detective Horner's report as to which hand the assailant used to discharge the gun. The other witness/victim, of course, could observe little while squatting on the floor boards of the vehicle. Significantly, Michael Baker's out-of-court identification of the Petitioner was made after speaking with his brother and only after his brother had made an identification.

Petitioner's trial counsel compromised the duty he owed to the Petitioner by failing to file the motion to suppress. The motion would in all probability have resulted in the exclusion of the out-of-court identification of the Petitioner and as the in-court

indentification lacked the requisite independent basis upon which to permit its admission, the Petitioner suffered prejudice to his defense. Trial counsel's failure to object to and/or challenge the in-court identification compounded the violation of the Petitioner's rights. Thus, trial counsel's omission, especially when combined with his failure to proffer special jury instructions concerning the identification testimony, and his failure to object to the instructions as given, constituted ineffective assistance of counsel and violated the Petitioner's Sixth Amendment and due process rights.

CONCLUSION

The issues raised by this appeal demand that this Court allow the writ. The failure of trial counsel to file a motion to suppress an unlawful pretrial identification which could have disposed of the State's case against the Petitioner cannot be justified under the most liberal interpretation of the harmless error doctrine. The circumstances surrounding this case demonstrate that the Petitioner was denied the effective assistance of counsel and thus due process of law by his trial lawyer's failure to investigate and raise potential defenses at trial and thereby preserve the same for appellate review. In this situation, the Supreme Court

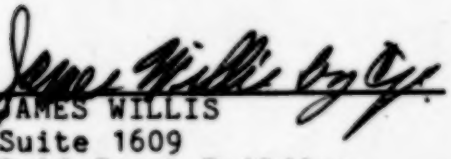
should grant the petition for writ of certiorari.

Respectfully submitted,

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